1040.

SUPREME COURT OF THE UNITED STATES.

No. 108.

THOMAS BROWN, PLAINTIFF IN ERROR,

vs.

THE UNION BANK OF FLORIDA.

IN ERROR TO THE COURT OF APPEALS FOR THE TERRITORY OF FLORIDA.

INDEX.

	Original.	Print.
Citation	1	2
Writ of error to the court of appeals	3	2
Judge's order	4	3
Proceedings in the court of appeals	5	3
Writ of error to superior court	5	3
Writ of scire facias	6	3
Transcript of record from the superior court	7	4
Writ of summons and return	8	5
Declaration	9	5
Defendant's pleas	10	6
Plaintiff's demurrers	15	8
Judgment	17	9
Bill of exceptions	17	10
Clerk's certificate	31	17
Assignment of errors	32	18
Judgment of court of appeals	36	19
Appeal bond	36	20
Clerk's certificate	39	21

J. & G. S. Gideon, printers.

The United States of America to the Union Bank of Florida, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of January next, pursuant to a writ of error filed in the clerk's office of the court of appeals of the Territory of Florida, wherein Thomas Brown is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Roger B. Taney, chief justice of the Supreme Court of the United States, this twenty-fourth day of February, in the year of our Lord one thousand eight hundred and forty-four, and of the independence of the United States the sixty-eighth year.

WM. MARVIN,
President Judge, in the absence of Jordon.

UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the judges of the court of appeals of the Territory of Florida, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea, which is in the said court of appeals of the Territory of Florida, before you, between the Union Bank of Florida and Thomas Brown, a manifest error hath happened to the great damage of the said Thomas Brown, as by his complaint appears; and it being fit that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of January next, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the honorable Roger B. Taney, chief justice of the said Supreme Court of the United States, this 23d day of February,
[SEAL.] in the year of our Lord one thousand eight hundred and forty-four, and of the independence of the United States the sixty-eighth year.

R. T. BIRCHETT, *Clerk.*

Court of Appeals, in open court.

Upon the filing of the bond approved by Judge Jordon in this cause, let this writ of error operate as a supersedeas of all further proceedings to be had under the judgment of this court.

WM. MARVIN, *Pres't judge.*

Pleas at the court house in the city of Tallahassee, before the honorable the court of appeals for the Territory of Florida, on the 20th February, in the year one thousand eight hundred and forty-four, and of the independence of the United States of America the sixty-ninth year.

Be it remembered that heretofore, to wit, on the 25th day of November, A. D. 1843, came the Union Bank of Florida, by its attorney, and sued out a writ of error from this honorable court to the superior court of the middle district of Florida, for the county of Leon, to reverse a judgment rendered in said superior court against said plaintiff in error, and in favour of Thomas Brown, the defendant in error; which writ of error is in the words and figures following, to wit:

"In the name and by the authority of the Territory of Florida, to the "judge of the superior court for the middle district of Florida, Leon "county, greeting:

"Because in the record and proceedings, and also in the rendering of "the judgment in our said court on the 7th day of March, 1843, in a "certain action of debt instituted in our said court by the Union Bank "of Florida, against Thomas Brown, manifest error hath happened, "to the great damage of the said Union Bank, as by its complaint we "have understood. We being willing that the error, if any has been, "should be duly corrected, and full and speedy justice done to the "parties aforesaid in this behalf, command you, that the record and "proceedings aforesaid, with all things touching the same, you under "your seal distinctly and plainly send to the judges of our court of "appeals at the city of Tallahassee, on or before the first day of the "next term, so that the judges, the record and proceedings aforesaid "being inspected, may further cause to be done therein what of right "and according to law ought to be done.

"Witness the hon. William Marvin, presiding judge of our said court "of appeals, at Tallahassee, this 25th day of November, [SEAL.] "1843, and the 68 year of American independence.

R. T. BURCHETT, *Clerk.*

And on the same day, to wit, on the 25th November, 1843, a *scire facias ad aud. errors*, directed to the defendant in error, was issued by the clerk of said court of appeals, which *sci. fa.* is in the words and figures following, to wit:

"The Territory of Florida, to the marshal of the court of appeals, "greeting.

"Whereas on the petition of the Union Bank of Florida, alleging "that in the record and proceedings, and also in the rendering of the

" judgment in a certain action of debt, instituted in our superior court " for the middle district of Florida, in and for the county of Leon, by " the Union Bank of Florida against Thomas Brown, manifest error " hath happened to the great damage of the said petitioner; a writ of " error hath been awarded, that the record and proceedings aforesaid " being inspected by the judges of our court of appeals, they may " cause to be done therein to correct that error what of right and ac- " cording to law ought to be done; therefore we command you, that " you make known to the said Thomas Brown, that he be before the " judges of our said court of appeals, at the court house in the city of " Tallahassee, on the first Monday in January next, then and there to " hear the record and proceedings, if to him it shall seem expedient; " and further to do and receive what our said court shall in this point " consider; and have then and there this writ.

" Witness the hon. Wm. Marvin, presiding judge of our said court of " appeals, at Tallahassee, this 25th day of November, 1843, [SEAL.] " and the 68th year of American independence.

" R. T. BIRCHETT, *Cl'k.*

Endorsed.—" Came to hand 29th Nov'r, 1843, and on the 30th served a copy on Thos. Brown. JNO. G. CAMP, *M.*
Per A. A. CAMP, *D. M.*

And afterwards, to wit, on the 30th day of December, 1843, came the plaintiff in error by its attornies, and filed in this honorable court the transcript of the record of the proceedings and judgment in the court below, returned and certified by the clerk of the superior court for Leon county, in obedience to the command contained in the writ of error directed to said court, which transcript is in the words and figures following, to wit:

UNION BANK OF FLORIDA, vs. THOMAS BROWN. } In debt.

" Pleas at the court house in the city of Tallahassee, on Tuesday " the seventh day of March, 1843, before the hon. Samuel J. Doug- " las, judge of the superior court for the middle district of Florida, in " and for the county of Leon.

" Be it remembered that heretofore, to wit, on the 6th day of April, " 1842, came the Union Bank of Florida by its attorney, and filed in " the clerk's office of the superior court of Leon county its præcipe, " which præcipe is in these words:

" TERRITORY OF FLORIDA:

In the superior court, middle district, Leon county.

UNION BANK, vs. THOMAS BROWN. } Debt $22,266 $\frac{34}{100}$.

This is an action of debt, to the damage of the plaintiff of five

thousand dollars; issue summons ad respondendum, returnable to the next term, according to law. Dated April 5th, 1843.

E. C. CABELL, *Pl'ff att'y.*

To R. T. Birchett, esq., clerk.

Whereupon a summons ad respondendum was issued in said case on the same day, in the words following, to wit:

"TERRITORY OF FLORIDA:

To the marshal of the middle district, greeting:

We command you to summons Thomas Brown, if he be found within the county of Leon, personally to be and appear before the judge of our superior court for said county, district aforesaid, at the court house in Tallahassee, on the fourth Monday in April inst., being the first day of our next term, to answer the Union Bank of Florida, in an action of debt for twenty-two thousand two hundred and sixty-six $\frac{34}{100}$ dollars, to the damage of the plaintiff of five thousand dollars; and have then and there this writ.

Witness Richard T. Burchett, clerk of our said court, this 6th day of April, A. D. 1842, and sixty-sixth year of American independence. [SEAL.]

R. T. BURCHETT, *Cl'k.*
By NATH'L B. PATCH, *D. C.*

Which summons was returned by the marshal, with the following endorsement thereon, to wit:

"Service of a copy hereof perfected 9th April, 1842.

J. G. CAMP, *M.*
By A. A. FISHER, *D. M.*

Afterwards, to wit, on the 25th day of April, 1842, being the first day of the regular April term, 1842, of said court, came the plaintiff by its attorney, and filed its declaration against the said defendant, which declaration is in the words following, to wit:

MIDDLE DISTRICT OF FLORIDA, *Leon county, sct:*

Leon superior court, spring term, 1842.

The Union Bank of Florida, plaintiff, complains of Thomas Brown, defendant, who was summoned to answer said plaintiff of a plea of debt, that he render to the said plaintiff the sum of twenty-two thousand two hundred and sixty-six $\frac{34}{100}$ dollars, with interest thereon at the rate of eight per cent. per annum, from the seventeenth day of April, 1841, till paid; which he, the said defendant, owes to and unjustly detains from the plaintiff; for this, that heretofore, to wit, on the fourteenth day of March, A. D. 1841, at Tallahassee, in the county aforesaid, the defendant by his certain instrument in writing, commonly called a single bill, sealed with his seal, and to the court here now shewn, the date whereof is the day and year last aforesaid, promised to pay one month after the date thereof to the plaintiff, at the banking house of said plaintiff, in the city of Tallahassee, twenty-two thousand two hundred sixty-six $\frac{34}{100}$ dollars, for value received; for securing payment

whereof said defendant thereby pledged his shares in the capital stock of said bank; yet the said defendant, although the said one month hath long since expired before the institution of this suit, and although often requested so to do, hath *hath* not as yet paid the said sum of twenty-two thousand two hundred and sixty-six $\frac{34}{100}$ dollars, with interest thereon as above demanded, or any part thereof, to the said plaintiff; but to pay the same, or any part thereof, the said defendant hath hitherto wholly refused and still doth refuse, to the damage of the plaintiff of $5,000, and therefore said plaintiff sues.

E. C. CABELL, *Pl'ff att'y.*

And at another day, to wit, on the 20th day of June, 1842, came the defendant, by his attorney, and filed in the clerk's office his several pleas, which are in the words following, to wit:

"THOMAS BROWN, als. UNION BANK OF FLORIDA. } Leon superior court, fall term, 1842.

1st. And for a further plea in this behalf, by leave of the court here first had and obtained, the said defendant comes and defends the wrong and injury, when, &c., and craves oyer of the said supposed writing obligatory, and it is read to him in these words:

"TALLAHASSEE, *March* 14*th*, 1841.

"Dolls. $22,266 $\frac{34}{100}$.

"One month after date I promise to pay to the Union Bank of Flo-"rida, at their banking house in the city of Tallahassee, twenty-two "thousand two hundred sixty-six $\frac{34}{100}$ dollars, for value received; for "securing payment whereof, I do hereby pledge my shares in the "capital stock of said bank. Witness my hand and seal.

"THOS. BROWN. [L. S.]

Which being read and heard, the said defendant says, that the said supposed writing obligatory is not his deed, and of this he puts himself upon the country, &c., and said plaintiff doth the like.

And for further plea in this behalf, the said defendant comes and defends the wrong and injury, when, &c.; and says actio non, &c., because he says, that the said supposed promises and undertakings, in the plaintiff's declaration mentioned, were originally founded on, and made in consideration of, certain contracts of discount and loan, made by and between the said plaintiff, by its agents, and said defendant; by which said contracts the said plaintiff then and there, to wit, on the several days and times, and at the places respectively in plaintiff's declaration mentioned, unlawfully, usuriously, and corruptly agreed and contracted with the said defendant to take and receive, and then and there, at the times and places mentioned, did take and receive, interest at a greater rate than eight per centum per annum, to wit, interest at the rate of nine per centum per annum, for the said loan and discount; and said defendant avers that said agreement and contract, and the receiving of said interest, was corrupt, usurious, and unlawful, and contrary to the

charter of said Bank, and against the form of the statute in such cases made and provided; and that said agreement and contract, and the promises, notes, and obligations mentioned by plaintiff, were given in pursuance of and in consideration of the same, and were when made, and still are, corrupt, unlawful, usurious, and null and void; and this he is ready to verify; wherefore he prays judgment, &c.

And for further plea in this behalf, said defendant comes and defends the wrong and injury, when, &c.; and says, actio non, &c., because he says, that at the several days and times, and at the places in plaintiff's declaration mentioned, it was unlawfully, usuriously, and corruptly agreed, by and between the said plaintiffs, by its agents, managers and servants, employed in the management and business of said bank, and the said defendant, that said bank would receive and discount the note in the plaintiff's declaration mentioned, and that the said defendant should receive therefor, from said bank, and have passed to his credit as a consideration for said note, the notes of the said Union Bank of Florida, at the nominal value of said notes; and for the discount aforesaid, the said bank then and there agreed to take and receive, and did then and there actually take and receive, interest at the rate of eight per centum per annum, upon the nominal amount of said note; and defendant avers, that in pursuance of said corrupt and unlawful agreement, the said note was delivered to the said plaintiff, at the time and places in the declaration specified, upon the terms aforesaid, said bank advancing and loaning therefor, as the whole and sole consideration of said note—after deducting a large sum from the amount of said note for discount, to wit, the sum of $ in notes of said Union Bank of Florida, counted and noted at their nominal value; and said defendant avers, that at the times when said note was discounted as aforesaid, the said Union Bank did not and would not pay lawful coin of the United States on demand for its said notes, and had refused, for a long time prior thereto, so to do, to wit, for the space of one month, and has continued to refuse to pay up to this time, to wit, in the county aforesaid; and the notes of the said Union Bank of Florida, were then, to wit, at the time of the discount aforesaid, in the county aforesaid, generally depreciated, so much that one hundred dollars thereof, nominally were of the value of ninety dollars, or less, and current only at that rate of depreciation, or less, for greater or smaller sums, to wit, at the county aforesaid; and said defendant avers, that said transaction and dealing was contrary to law and the charter of said bank, and the said note was founded upon a corrupt, unlawful, and usurious consideration, and that said plaintiff agreed to receive, and did receive, a greater rate of interest than that allowed by law, upon the value of said notes loaned, or given in discount as aforesaid by said bank; and this said defendant is ready to verify; wherefore he prays judgment, &c.

And for further plea, &c., defendant comes, &c., and says, actio non, &c., because he says, that the plaintiff, at the time and place in the declaration mentioned, of the endorsement of said note to said bank, unlawfully and corruptly, received a larger rate of interest upon the

discount of the note, in the plaintiff's declaration mentioned, than was then and there lawful, to wit, interest at the rate of eight and one tenth per centum per annum, and the same was null and void; and this he is ready to verify; wherefore, prays judgment, &c.

And for further plea, &c., defendant comes, &c., and says, actio non, &c., because he says that the note in the declaration mentioned was given as security for a loan and discount, made by plaintiff on the day of in the year 18 to defendant, who was then and there a stockholder; and that said bank was compelled by law and its charter to make said loan to defendant, and was bound by law to make such loan in specie, or its equivalent; but said loan was made in the notes of said bank, which did not then pay specie, and has not since paid specie for its obligations, and which said notes were then depreciated one twenty-fifth part of their nominal value; and said bank was bound by its said charter to receive interest annually, and not oftener, and at the end of each year, and not in advance; yet said defendant avers, that said interest was taken in advance, and more frequently than once a year; and so he in fact says, that upon such loan and discount said bank corruptly and unlawfully received interest at a rate greater than was lawful, to wit, at the rate of eight and one tenth per centum, and that [for] said original loan and discount *and* said note was given as collateral security, and null and void in the hands of said bank, and all claiming under it, and this he is ready to verify; wherefore he prays judgment, &c.

And for further plea, &c., by leave, &c., the said defendant comes, &c., and says, actio non, &c., because he says that he, after the said month, in the said writing obligatory mentioned, had elapsed, and before the commencement of this suit, to wit, on the 15th day of June, A. D. 1841, in the county of Leon aforesaid, paid to the said plaintiff said sum of twenty-two thousand two hundred and sixty-six $\frac{34}{100}$ dollars, in the said writing obligatory mentioned, together with all interest then due thereon, and this he is ready to verify; wherefore he prays judgment if said plaintiff ought further to have or maintain its action aforesaid against him. BROCKENBROUGH, *for def't.*

To first plea simileter.

" sixth general replication.

CABELL & THOMPSON & HAGNER,
For the plaintiff.

And at another day, to wit, at a superior court for Leon county, continued and held at the court house, in the city of Tallahassee, on Saturday, the 4th day of March, 1843, came the parties by their attornies, and the plaintiff by his attorney filed a general demurrer to the second, third, and fourth, and a special demurrer to the fifth plea of the defendant filed herein, which demurrers are in the following words, to wit:

" And as to the said pleas by the said defendant secondly, thirdly, and fourthly pleaded, the said plaintiff says, that the same and the matters therein contained are not sufficient in law to bar or preclude, &c., and this he is ready to verify; wherefore he prays judgment, &c.

"To the fifth plea plaintiff says, that the same and the matters therein contained are not sufficient in law, nor is the plaintiff bound to answer the same, and assigns for cause of demurrer: 1st, because the said defendant has not by his said plea traversed or denied, or attempted to put in issue any matter of fact alleged by the plaintiff, but has introduced, and attempted to put in issue, matters of fact not alleged, nor necessary to be alleged; and for that said plea is no answer to said declaration, but is evasive and argumentative; and for that the said plea is double and contains a two-fold answer to the declaration, in this, viz, that the said defendant hath thereby pleaded and alleged, that the said loan was required to be made in specie, and was in fact made in notes of said bank; and also hath thereby pleaded and alleged, that the bank demanded interest in advance on such loan, although required to be made only annually; and for that the said plea doth not allege that the said defendant refused to take such notes in payment, when presented to him as aforesaid, and refused to pay the said interest in advance upon said loan, as it is essential should be avered and charged, to repel the presumption of consent arising from such receipt of the said loan and payment of the said interest in advance; and for that the said plea amounts to the general issue, and is uncertain, informal and insufficient.

CABELL & T. & H.,
For plaintiff.

And on the same day, to wit, on the 4th day of March, 1843, at the same term of the court, the defendant having joined in the said demurrers, the same were fully argued before the court on the question of law arising on said demurrers; and after hearing the argument of counsel, and having maturely considered the same, the said demurrers were severally sustained by the court. Whereupon came a jury, to wit, Marshal N. Cutter, Daniel Johnson, Benjamin Horn, John W. Lavinus, Joseph Dowling, John Daffin, Levi Carlton, J. Willis, Elijah Johnson, Edward Loockerman, Edgerton Willis, and Jessee M. Robinson, who being elected, tried, and sworn the truth to speak upon the issues, and having partly heard the evidence, were adjourned over until Monday morning, 10 o'clock.

And at another day, to wit, on Monday, the 6th day of March, 1843, of the said same term of the court, came the parties by their attornies, and the jury sworn on Saturday last in this case, having appeared in court according to adjournment, and having further heard the evidence, are adjourned over until to-morrow morning, 10 o'clock.

And at another day, to wit, at a court continued and held at the court house in the city of Tallahassee, on Tuesday, the 7th day of March, 1843, came the parties by their attornies, and the jury aforesaid having fully heard the evidence, and the argument of counsel, retired to consider of their verdict, and after a short time returned into court, and presented the following verdict: "We the jury find for the defendant;" therefore it is considered by the court that the plaintiff take nothing by his bill, but for his false clamour be in mercy, &c., and that the de-

fendant recover against the said plaintiff his costs by him in and about his defence in this behalf expended.

Memorandum.

Upon the trial of this cause, the following bill of exceptions was taken to opinions of the court given on the trial, and signed and sealed by the court, and ordered to be made a part of the record in this case, which said bill of exceptions is in the words and figures following, to wit:

Bill of exceptions, filed on 7th March, 1843.

UNION BANK OF FLORIDA,
vs.
THOMAS BROWN.

"Be it remembered, that on the trial of the issues joined in this case the plaintiff gave in evidence to the jury the following bond:

"Dolls. 22,266 $\frac{34}{100}$. TALLAHASSEE, *March 14th*, 1841.

"One month after date I promise to pay to the Union Bank of Florida, "at their banking house in the city of Tallahassee, twenty-two thous- "and two hundred sixty-six $\frac{34}{100}$ dollars, for value received, for secur- "ing payment whereof I do hereby pledge my shares in the capital "stock of said bank. Witness my hand and seal.

"THOS. BROWN. [L. S.]

And here rested his case.

The defendant, to support the issues joined on his part, introduced Henry L. Rutgers, a witness of lawful age, who, being sworn, deposed as follows:

That he is and has long been an officer of the plaintiff, the Union Bank of Florida. That the bond sued on was handed into the bank by the defendant on the fifteenth of June, eighteen hundred and forty-one. That it was to renew a bond due on fourteenth March, eighteen hundred and forty-one, the day this sued on bears date. That the interest thereon is paid to seventeenth day of April, eighteen hundred and forty-one. That interest was payable on this last mentioned day, and the bond renewable. It is customary for the bank to take the interest in advance, and to renew the bonds or notes even for one month. Interest is chargeable for the days of grace, no matter how long or short a time the note was to run; but a credit is given always for the days of grace, the note not being due until the expiration of the days of grace. The dates of the maturity of the notes are endorsed on them by the officer of the bank. The defendant's stock in the bank was sold 29th December, eighteen hundred and forty-one. It had been advertized previously, but was not sold at the time first appointed. General Brown, the defendant saw the president or cashier of the bank, and the sale was postponed. Interest is calculated in the bank by Rowlett's tables. Never made any calculation of the difference between taking interest in advance and after note due. It is the custom of all banks to take interest in advance. The memorandum in witnesses hand writing contains the whole of defendant's stock transactions.

☞Vide Rutger's statement.

Statement of Thomas Brown's stock notes and renewals thereof, and amount of shares held by him at different times.

		Shares	Am't note.	In't off.
1835				
Jan'y 28	Stock note payable 12 mos. after date -	159	10,600	857 43
April 29	Do. " 12 " do. -	186	1,200	97 07
June 17	Do. " 12 " do. -	186	934	75 55
1836				
June 20	Do. " 12 " do. -	186	13,000	1,397 00
1838				
June 28	Do. " 4 " do. -	160	4,320	119 04
1839				
Feb'y 11	Do. " 3 " do. -	502	33,533	700 49
June 12	Do. " 87 days do. -	502	33,533	507 84
Aug't 16	Do. " 64 " do. -	502	33,533	476 93
1840				
Jan'y 30	Do. " 12 " do. -	502	33,533	88 89
May 15	Do. dated 14 Mar. 4 mos. do. -	334	22,266 34	606 29
Aug't 15	Do. payable 2 " do. -	334	22,266 34	316 68
Oct'r 15	Do. " 2 " do. -	334	22,266 34	316 68
1841				
Jan'y 20	Do. " 2 " do. -	334	22,266 34	316 68
March 8	Do. " 48 days do. -	334	22,266 34	237 51
June 15	Do. dated 14 March, 1 month do. -	334	22,266 34	168 24

Note.—On the 20th June, 1836, T. Brown's three stock notes were united; and on the 15th Feb'y, 1839, his old and new stock were united in one note as above; and in March, 1840, said Brown transferred 166 shares of stock, and gave his note for the remaining 334 shares.

It is taken from the books of the bank. This loan of money, made to the defendant by the bank, was for a stock loan under the charter. The interest was always taken and received in advance, and for the days of grace, unless excepted on the face of the note to be without grace. The defendant then proposed to prove by said witness, that interest was taken in advance on the bond sued on, and said bond renewed for a period less than one year, in order to shew that said bond sued on was made in violation of the charter of said plaintiff.

The plaintiff, by his counsel, objected to the admission of such evidence, because they insisted the said plaintiff had a right to receive interest in advance, and was entitled to receive a bond for a less period than one year. But the court overruled the exception, and gave its opinion that the plaintiff had no right to demand and require the interest in advance, and that it could not require the stockholder to renew his bond for a less period than one year; to which opinion of the court, and the admission of said evidence, plaintiff by his counsel excepts.

Henry L. Rutgers, the said witness, then proved, that on the bond of the defendant the interest was received by the bank in advance; that the bank was in the habit of receiving obligations for less periods than one year.

Being *cross-examined*, the witness further stated, that interest for a less period than one year was never taken by the bank except to accommodate the stockholder, and that it was so done to the great inconvenience of the bank and its officers; and that the bank never required the bond of the stockholder to be renewed for a less period than one year, but that the same was renewed for such period as the convenience of the stockholder suggested. The bank would receive small payments of interest as offered, and calculations of interest were then made. That the custom of the bank has always been to receive interest in advance. That this custom must have been known to defendant. That the defendant has often so paid interest in advance. That the defendant was teller of the bank, from the commencement of the bank until eighteen hundred and thirty-seven, and as such officer must have had knowledge of the custom of the bank.

Being *re-examined* by defendant's counsel, he says, the stock notes or bonds would often lie over for many months; they were taken as of the period at which interest was due, or else, as was sometimes the case, the payment of interest was endorsed on the bond. Stockholders would often come and ask witness to let them pay three or four month's interest only, which was acceded to. Does not recollect to have heard the defendant object to paying the interest in advance. Witness was present at sale of defendant's stock; heard defendant forbid the sale, and say that the interest was not due. The stock sold for twenty-five per cent. premium. The interest was always calculated in the bank by Rowlett's tables.

The defendant then produced John G. Gamble, a witness of lawful age, who being sworn, says: That he is, and has been since its organization, the president of the Union Bank of Florida. That the defendant did not except to the mode adopted by the bank, of taking interest in advance. Never heard any exception till some two years since, when Col. Long advanced the idea in argument upon the amended charter. The defendant sided with Col. Long on the subject; but no vote was ever taken on the subject of taking the interest in advance. At the time the difficulty was stated, large amounts of interest were due. The amended charter was accepted by a vote of ten thousand and twenty-seven shares against five hundred. Seven persons voted against accepting it, of which defendant was one—they represented the five hundred shares; forty-eight stockholders voted for it, representing ten thousand and twenty-seven shares.

The right of the bank under the charter to take interest in advance, was determined on in the directory immediately upon the organization of the bank, and no question was ever made as to the legality of receiving interest in advance. The defendant was one of the first officers chosen, he acted till eighteen hundred and thirty-seven. The customs of the bank were known to defendant. He could not transact his business as an officer without such knowledge. The bank became the purchaser of defendant's stock in order to avoid the issue of its notes, which it would have been obliged to make had a new stockholder come

in and drawn the two-thirds to which he would have been entitled. It would have been forced to extend its liabilities, contrary to the injunction of the legislative council, and the expressed desire of the stockholders to decrease them. The bank considered it could make the purchase, because it retained territorial bonds to a large amount yet unsold.

The defendant then produced John Parkhill, a witness of lawful age, who being sworn, deposed and said, that he was cashier of the Union Bank of Florida, from its organization up to the first January, eighteen hundred and forty. Has heard conversations in the bank about charging interest in advance on stock notes. No formal objection thereto, or protest against it, was ever made by any one. The defendant in conversation doubted the right of the bank to require it, but never made a formal demand. The loan upon defendant's *new stock* was made to him in Union Bank notes; it was discounted in eighteen hundred and thirty-eight. The rate of discount or depreciation of the bank notes was not more than five or six per cent. in that year. Loans were made upon the stock being secured.

Being cross examined, he says that in eighteen hundred and thirty-eight, by a rule adopted by the bank, the discounts receivable upon the new stock were to be applied to antecedent debts due for accommodation. Does not know that it was done in defendant's case. The bank went into operation on the sixth of January, eighteen hundred and thirty-five. Witness first heard of conversation on the subject of taking interest in advance in eighteen hundred and thirty-six. But for the hardness of the times witness thinks it might never have been objected to. The stock notes might be discounted for twelve months, or for any shorter time to suit the convenience of the stockholder. The bank has always used Rowlett's tables. Witness does not know that there is any gain in using them. Never examined them to ascertain. They were used by the bank for sake of convenience. The bank received and paid interest by them. The officers of the bank also paid interest by them.

The defendant here rested his case.

The plaintiff thereupon moved the court to instruct the jury—

First. That to constitute usury within the prohibition of the law, there must be a corrupt intention knowingly to contract for, or to take usurious interest contrary to law, or the charter of the bank; which instruction the court granted, and gave the law to the jury.

Second. That the taking interest in advance upon the loans to stockholders, provided for in the twenty-ninth section of the charter of the Union Bank of Florida, is allowed by the said charter. Which instruction the court denied, and refused to give the same to the jury.

Third. That if the 28th section of said charter does not provide the rate of interest on the loans to stockholders, contemplated in the 29th section, then that the plaintiff is allowed to take interest thereon by the general law regulating the taking of interest in this territory, in the absence of express provision of the charter fixing the rate of interest on such loans.

Which instruction the court granted, and gave the same to the jury.

Fourth. That unless there be statutary provision to the contrary, the grant of the franchise of incorporation allows interest on money loaned by the bank to be taken in advance; and that with or without such statutary provision the bank may, at the instance of any party, take the interest in advance on any loan he applies for or receives from the bank.

Which instruction the court denied, and refused to give same to the jury.

Fifth. That whether the charter does or does not allow the bank to demand interest in advance on such loans, yet that if the jury believe from the evidence that it was the custom of the bank to receive it in all cases, and that the defendant, being a stockholder, paid interest in advance on such loans in accordance with such custom, and with full knowledge thereof, without coercion on the part of the bank, and without objection at the time of such payments made, he cannot now invalidate the same, nor claim credit for interest on such interest paid in advance.

Which instruction the court granted, and gave same to the jury.

Sixth. That if the jury believe from the evidence that, before the receipt by the plaintiff of interest in advance on the loans, contemplated in 29th section upon the organization of the said bank, it was at a regular meeting of the directory, and by the consent of the stockholders, and without objection from any one of them, established as a rule of action for said bank, definitively settled and mutually agreed upon, that said bank would receive from all stockholders interest in advance; and that agreeably thereto the said defendant has, from time to time, without objection, conformed to such rule, and acquiesced therein, by paying interest in advance; then that such special agreement between the parties, as to the construction of the charter in this regard, will inhibit and prevent the defendant from now setting up objection, that the charter does not allow the bank to require the payment of interest in advance.

Which instruction the court granted, and gave same to the jury.

Seventh. That the charter of said bank does not inhibit the plaintiff from receiving, at the special instance and request of a stockholder, and for his accommodation, bonds or obligations for the payment of loans under the 29th section of the charter, payable at shorter periods than one year, upon payment up of interest.

Which instruction the court granted, and gave same to the jury.

Eighth. That if the defendant, while a stockholder, did deliver to the plaintiff the bond sued on, payable at a less period than one year, at his own instance, and for his own accommodation, then "that it does not lie in his mouth for this cause to avoid his contract," whatever may be the right of the government to seize the franchise of plaintiff upon due process for that cause.

Which instruction the court granted, and gave same to the jury.

Ninth. That a general custom of the bank to receive interest in advance if brought home to the defendant, either by express or implied

knowledge thereof, enters into the essence of the contract, becomes a constituent part of it, and so far as the defendant is concerned, precludes him from setting up plaintiff's inability to make such contract.

Which instruction the court denied, and refused to give the same to the jury.

Tenth. That each renewal of such stock bond is considered in law a distinct and substantive transaction, and that the said plaintiff is entitled to demand and require the interest upon each bond so renewed to be paid up.

Which instruction the court granted, and gave same to the jury.

Eleventh. That if the jury believe from the evidence, that after the bond sued on became due the defendant neglected to renew or pay up the same, for the space of thirty days and more, before the institution of this suit, then that the plaintiff was entitled to institute the same, and may maintain this action.

Which instruction the court granted, and gave the same to the jury.

Twelfth. That if the jury believe that the amendment of the charter of said bank, passed in eighteen hundred and thirty-nine, was accepted by a majority of the stockholders in general meeting assembled, then that is binding upon all the stockholders, and was binding upon the defendant as such stockholder, whether he assented to it or not.

Which instruction the court granted, and gave the same to the jury.

Thirteenth. That under said original and amended charter, the loan contemplated in 29th section was and is based upon the conditions, *first*, that notes or obligations are annually renewed; and *second*, that interest is paid up, and that by force of those provisions, the right of said defendant to a continuance of the credit by said section allowed, is based upon compliance with those conditions, failing which the plaintiff is not bound to continue such credit or loan to the defaulting stockholders; and that if such stockholder neglects to renew or pay up his stock note for the space of thirty days after the same shall have become due, the shares of stock pledged to the bank become, by act of law, forfeited to the bank. That upon such forfeiture, the stock bond or note becomes due and payable, and that action therein may be maintained by the bank.

Which instructions the court granted, and gave the same to the jury.

Fourteenth. That the taking usurious interest does not, in this Territory, render the contract void, but only avoids the usurious interest taken thereon, and forfeits the same; and if the jury should find that the plaintiff, by corrupt agreement, knowingly contracted for more than legal interest, then the only effect thereof in this case will be the abating such usurious interest taken on the bond.

Which instruction the court denied, and refused to give the same to the jury.

The defendant by his council moved the court to instruct the jury:

First. That if the jury believe that the bank by taking interest in advance, by giving depreciated paper, by calculating the year at three hundred and sixty days, or by any other shift or device whatever, in-

tentionally took more than eight per cent. per annum interest, that then the plaintiff cannot recover.

Which instruction the court granted, and gave the same to the jury.

Second. That if the jury believe that the defendant was coerced by the bank to pay interest in advance as a condition for a renewal of the note, and took a new note for only a month's date, because *plaintiff* could not pay more interest in advance than for the month, then that the note cannot be recovered upon.

Which instruction the court granted, and gave the same to the jury.

And the court also gave to the jury the following instructions:

First. That to constitute usury within the prohibitions of the law, there must be an intention knowingly to contract for and to take usurious interest; for if neither party intended it, and acted *bona fide* and innocently, then the taking of more than legal interest will not be held to be usurious. The taking however more than the legal rate of interest is *prima facie* evidence of the corrupt intent which the party may and must explain.

Second. The consent and agreement of the parties cannot legalize the taking of usurious interest; the policy of the law is to inhibit the taking of usury; so much so in this Territory, that the act is declared to be criminal, and punished by the penal law. This being the case, the parties cannot by consent violate the law. This does not conflict with the general principle that consent makes the law. This principle is unquestionably true, when the consent amounts to a contract between the parties, but this can never be held to extend to contracts in violation of the law and its policy.

Third. The paying of depreciated notes at the counter of the bank is not *per se* usurious; but if intended as a shift or device to cover a loan of money and obtain more than legal interest, then it is in violation of law, and usurious. If however the bank in good faith intended a loan of bank notes which to the bank were of the full value of their numerical amount, and were so received and treated by Gen'l Brown, the defendant, then the transaction is not tainted with usury. If however the notes were not of their full numerical value to the bank, and were not so received and treated by the defendant, Thomas Brown, then in law the transaction is usurious.

Fourth. The bank by its charter can only receive eight per centum interest, and should it receive more, then the interest is forfeited, in same manner as if an individual were to take more than ten per centum. An excess over eight per centum is to the bank what an excess over ten per centum is to an individual. The 28th section of the act of incorporation gives the only power to the bank to receive interest at all, and this limits the interest to eight per cent.; but for this section the bank could receive no interest.

Fifth. If you shall believe from the testimony, that no interest was due upon this note at the institution of this suit, then the plaintiff is not entitled to recover in this action.

Sixth. If you shall believe from the testimony that the defendant

Thomas Brown was ready and willing annually to renew his stock note and to pay the interest thereon, but was prevented by the refusal or conduct of the bank from so doing, then the bank cannot recover in this action.

Seventh. If you shall believe from the testimony that the bank imposed conditions not warranted by its charter, but in violation thereof, and in consequence of this conduct on the part of the bank, the defendant was prevented from the renewal of his stock note, then the bank cannot recover in this action.

Eighth. If you shall believe from the evidence, that the bank in this case knowingly took a greater rate of interest than eight per cent. per annum, then the transaction is usurious, the entire interest forfeited, and this action cannot be maintained, as no interest was due upon the note at the time of forfeiture of the stock; and thereupon, with these directions left the same to the jury. And the jury aforesaid then and there gave their verdict for the defendant.

To which several refusals of the said court to grant the second, fourth, ninth, and fourteenth instructions prayed for by the said plaintiff, and to the granting by the said court of the two instructions prayed for by the defendant, and to the giving to the jury the second, fifth, sixth, seventh, and eighth instructions drawn up and presented to the jury by the said court at its own instance, the plaintiff by his council excepted. And for as much the said several matters so produced and given in evidence on the part of the said defendant, and by the council of the said plaintiff objected to, and insisted on as inadmissable in evidence on the trial of the issue aforesaid, do not appear by the record of the verdict aforesaid, the said council for the plaintiff did then and there oppose their aforesaid exception to the opinion of the said judge, admitting 'said evidence and refusing said instructions refused, and granting said instructions granted as aforesaid; and requested the said judge to put his seal to this bill of exceptions, containing the several matters so produced and given in evidence as aforesaid, according to the form of the statute in such cases made and provided; and thereupon the said judge at the request of the council for the above named plaintiff, did put his seal to this bill of exceptions on the sixth day of March, anno domini one thousand eight hundred and forty-three, and of the independence of the United States of America the sixty-seventh year.

SAM'L J. DOUGLAS, [SEAL.]
Judge.

TERRITORY OF FLORIDA, *Leon county, to wit:*

I, Richard T. Burchett, clerk of the superior court for the county of Leon, do hereby certify, that the foregoing pages, numbered from 1 to 26, contain a true record of the proceedings had in a certain action of debt lately pending in said court, between the Union Bank of Florida, plaintiff, and Thomas Brown, defendant, with all things touching the same, as fully and wholly as they now exist among the records of my said office.

In testimony whereof, I hereto set my hand and affix the seal of the said court at Tallahassee, this 30th day of December, 1843.
[SEAL.]
R. T. BURCHETT, *clerk.*

And afterwards, to wit, at a court of appeals for the Territory of Florida, continued and held at the court house in the city of Tallahassee, on Monday, the day of January, 1844, the appellant by its counsel filed the following assignment of errors, to wit:

UNION BANK OF FLORIDA, plaintiff in error,
vs.
THOMAS BROWN, defendant in error.

In court of appeals, January term, 1844, upon writ of error to Leon superior court.

The plaintiff in error assigns for errors in the judgment and proceedings of the court below, in this:

I. In the admission of the evidence excepted to by the plaintiff below, the plaintiff in error in this court.

II. That the court erred in refusing the instructions to the jury which were prayed for by plaintiff below.

III. That the court erred in granting the instructions prayed for by the defendant in the court below.

IV. That the court erred in instructing the jury in the 2d, 5th, 6th, 7th, and 8th instructions, drawn up and presented to the jury by the said court at its own instance.

E. C. CABELL.
THOMPSON & HAGNER,
For plaintiff in error.

And afterwards, to wit, at a court of appeals for the Territory of Florida, continued and held at the court house in the city of Tallahassee, on Monday, the 22d day of January, 1844, the following order was made in said cause:

UNION BANK OF FLORIDA,
vs.
THOMAS BROWN.

This cause was this day partly heard upon the transcript of the record of the judgment aforesaid, and the argument of counsel, and is continued until to-morrow for a further hearing thereof.

And afterwards, to wit, at a court of appeals for the Territory of Florida, continued and held at the court house in the city of Tallahassee, on Tuesday, the 23 day of January, 1844, the following order was made:

UNION BANK OF FLORIDA,
vs.
THOMAS BROWN.

This cause was this day further heard upon the transcript of the record of the judgment aforesaid, and the argument of counsel, and is continued till to-morrow for a further hearing thereof.

And afterwards, to wit, at a court of appeals for the Territory of Florida, continued and held at the court house in the city of Tallahassee, on Wednesday, the 24th day of January, 1844, the following order was made in this cause:

UNION BANK OF FLORIDA,
vs.
THOMAS BROWN.

This cause was this day further heard upon the transcript of the record of the judgment aforesaid, and the argument of counsel, and is continued until to-morrow for a further hearing thereof.

And afterwards, to wit, at a court of appeals for the Territory of Florida continued and held at the court house in the city of Tallahassee, on Thursday, the 25th day of January, 1844, the following order was made in this cause:

UNION BANK OF FLORIDA,
vs.
THOMAS BROWN.

This cause was this day further heard upon the transcript of the record of the judgment aforesaid, and the argument of council, and is continued till to-morrow for a further hearing thereof.

And afterwards, to wit, at a court of appeals for the Territory of Florida, continued and held at the court house in the city of Tallahassee, on Friday, the 26th day of January, 1844, the following order was made in this cause:

UNION BANK OF FLORIDA,
vs.
THOMAS BROWN.

This cause was this day fully heard upon the transcript of the record of the judgment aforesaid and the argument of council; but because the court is not yet advised of its judgment to be given in the premises, time is taken to consider thereof.

And afterwards, to wit, at a court of appeals for the Territory of Florida, continued and held at the court house in the city of Tallahassee, on Tuesday, February 20th, 1844.

UNION BANK OF FLORIDA, plaintiff in error,
vs.
THOMAS BROWN, defendant in error.

Upon a writ of error to a judgment of the superior court for the middle district for Leon county, rendered on the 7th day of March, 1843, whereby it was considered that the plaintiff in error take nothing by his bill, but for his false clamor be in mercy, &c.; and that the defendant in error should recover against the said plaintiff in error his costs by him about his defence in that behalf expended.

This day came the parties by their attornies, and thereupon the transcript of the record of the judgment aforesaid being seen and inspected, and said parties having been fully heard by council, it seems to the court here that there is error in said judgment. Therefore, it is considered by the court, that the said judgment be reversed and annulled; and it is further ordered, that the verdict rendered in this cause be set aside, and that this cause be remanded to the court below, with instructions to said court to award a *venire facias de novo*, for a new trial of the issues to be had therein, and that the plaintiff in error recover against the defendant in error $ his costs by him about his said writ of error herein expended; which is ordered to be certified to the court below.

And afterwards, to wit, on the 24th day of February, A. D. 1844, came the defendant in error, and filed the following bond, with certificates and affidavit, as follows:

SUPREME COURT, UNITED STATES:

THOMAS BROWN,
vs.
THE UNION BANK OF FLORIDA. } In error.

Know all men by these presents, that we, Thomas Brown and Hamilton Hudson and Francis Holden, are held and firmly bound unto the above named Union Bank of Florida, in the sum of two hundred dollars, to be paid to the said Union Bank of Florida, or its assigns. To which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents. Sealed with our seals and dated this twentieth day of February, one thousand eight hundred and forty-four.

Whereas the above named Thomas Brown hath prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit, by the court of appeals of the Territory of Florida.

Now, therefore, the condition of this obligation is such, that if the above named Thomas Brown shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

(Signed,) THO. BROWN, [SEAL.]
" FRANCIS HOLDEN, [SEAL.]
" H. HUDSON. [SEAL.]

Sealed and delivered in presence of—

DILLON JORDAN,
President of the court of appeals in Florida.

Court of appeals, January term, 1844.

Believing the obligors in the foregoing bond amply good for the penalty thereof, I do hereby approve the same.

(Signed,) DILLON JORDAN,
President judge of the court of appeals of Florida.

THOMAS BROWN, plaintiff in error,
vs.
UNION BANK OF FLORIDA, defendant in error.

Error to Supreme Court of United States.

Personally appeared before the subscriber, presiding judge of the court of appeals for the Territory of Florida, Thomas Brown, plaintiff in the above entitled cause, who being duly sworn the truth to speak, deposeth and saith, that the sum of money in controversy in this cause exceeds the sum of one thousand dollars, exclusive of costs.

THO. BROWN.

Sworn to and subscribed before me, this 20th day of February, A. D. 1844.

DILLON JORDAN,
President judge of the court of appeals in Florida.

TERRITORY OF FLORIDA:

Court of appeals, January term, 1844.

I do hereby certify, that the amount in controversy in the above recited cause exceeds in money one thousand dollars, exclusive of costs.

(Signed,) DILLON JORDAN,
President judge of the court of appeals, Florida.

And afterwards, to wit, on the 24th February, A. D. 1844, the appellant lodged in the clerk's office of the court of appeals for the appellee, a copy of the writ of error granted herein, and also filed the citation annexed hereto.

TERRITORY OF FLORIDA, *sct:*

I, Richard T. Birchett, clerk of the court of appeals for the Territory of Florida, do hereby certify, that the foregoing pages contain a true transcript of the record and proceedings lately had in a certain writ of error lately pending in said court of appeals, between the Union Bank of Florida, plaintiff, and Thomas Brown, defendant, with all things touching the same, as fully and wholly as they now exist amongst the records of my said court.

In testimony whereof, I hereto set my hand and affix my official seal, at Tallahassee, this 12th day of February, A. D. 1845.
[SEAL.]

R. T. BIRCHETT, *Clerk.*

Filed 28th February, 1845.